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**SUPPLEMENT TO NOTICE OF DISPUTE -
OPERABLE UNIT 4 REMEDIAL INVESTIGATION
(RI) REPORT**

12/26/90

**DOE-499-91
DOE-FMPC/USEPA
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LETTER**



Department of Energy

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DEC 26 1990

DOE-499-91

Mr. David A. Ullrich, Director
Waste Management Division
U.S. Environmental Protection Agency
Region V-5H-12
230 South Dearborn Street
Chicago, IL 60604

Dear Mr. Ullrich:

Supplement to Notice of Dispute - Operable Unit 4 Remedial Investigation (RI) Report

On December 20, 1990, the Department of Energy (DOE transmitted to you its response to your December 7, 1990 Notice of Violation (NOV) concerning the disapproval of the Remedial Investigation report for Operable Unit 4. Please consider this as a supplement to that letter, expressing in more detail the positions taken in the earlier letter.

The events which are described on page 2 of the December 20, 1990 are sufficient to constitute grounds under the terms of the Consent Agreement for an extension of time. For example, the inability to obtain a complete cross section of the silo during sampling has caused considerable delay in obtaining the necessary data. You will remember that the dates negotiated for Operable Unit 4 were predicated on the assumption that the sampling campaign of the summer of 1989 would be successful and adequate to support the remedial investigation. DOE's efforts to obtain adequate sampling data have been to overcome the technical problems associated with the silo materials. Surely under Section XVIII Extensions, and possibly under Section XIX Force Majeure, DOE should be entitled to reasonable extensions of time to complete the acquisition of sufficient analytical data to satisfy your legitimate concerns with respect to the remedial investigation report. (Incidentally, DOE fully recognizes that it failed to comply with the notice provision of the Force Majeure Section and would ask Region 5, in all fairness, to waive the notice requirement in this instance.)

The failure of the Radon Treatment System in March 1990 caused DOE to experience substantial unanticipated delays. With respect to the silos worker health and safety simply cannot be ignored. The unanticipated breakage of machinery, equipment or lines of pipe is specifically identified in Section XIX Force Majeure as a basis for excused performance and an extension of time. Furthermore, Section XVIII Extensions recognizes that force majeure events are reasons for extensions and, undoubtedly, Region 5 would agree that basic worker health and safety concerns are good cause for an extension.

DOE, therefore, would ask that Region 5 waive any notice defects with respect to requests for extension or force majeure events, since it is clear that Region 5 was aware of the difficulties DOE was experiencing and was not prejudiced in any way by DOE's failure to provide notice. Region 5 and DOE should then engage in good faith negotiations to arrive at a reasonable extension of time to cover the legitimate difficulties DOE is encountering with the silo effort. In so adjusting the schedule DOE and Region 5 will resolve the December 7, 1990, NOV.

Once the problems with the Remedial Investigation report have been resolved, their impacts on the rest of the Remedial Investigation/Feasibility Study effort will need to be managed. Under Section XVIII Extensions, DOE and EPA should establish a reasonable schedule for the submission of a proper feasibility study, since the extension of time with respect to the Remedial Investigation report will provide a basis for an extension of the due date for the subsequent documents.

The approach outlined above, should be undertaken now, because the constant pressure to try to regain schedule will only lead to less than satisfactory work. Let's take the time now to recognize what needs to be done and establish a sensible method for proceeding.

Region 5's NOV also assessed stipulated penalties under the Consent Agreement. As our letter of December 20, 1990, indicated, although somewhat obliquely, DOE does not believe that an assessment is appropriate in this instance. DOE and EPA negotiated the stipulated penalties model language to assure the timely submission of primary documents. DOE and EPA intended that the quality of the documents could be resolved through the resolution of disputes procedures. Obviously, DOE could not submit a pile of blank papers with a cover sheet and argue that it has submitted a timely document. But, in this case, DOE submitted a document based on the best information available to it. Stipulated penalties are not appropriate in this instance and serve no useful purpose.

Please consider the foregoing as a supplement to the statement of DOE's position which was provided earlier. As always, we remain ready to resolve these matters with you at your convenience.

Sincerely,



Gerald W. Westerbeck
FMPC Site Manager

DP-84:Westerbeck

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cc:

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